* **HIGH COURT OF DELHI : NEW DELHI**

\+ **WP(C) No.6029/03**

Judgment reserved on: August 21, 2007

% Judgment delivered on: September 24, 2007

Govt. of National Capital Territory of Delhi & Ors. .... Petitioner
Through: Ms. Avnish Ahlawat with
Ms. Latika Choudhary,
Advocates

versus

Ms. Sunita Mumgaie ..... Respondent
Through: Mr. V. K. Shali with
Ms. Mamta R. Jha, Advocates

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

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1. The petitioner assails the order dated 9th April, 2003 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in OA No.2568/2002 filed by the respondent, and the order dated 23rd June, 2003 passed in RA No. 153/2003 filed by the petitioner, in the aforesaid OA, whereby the Tribunal allowed the said OA and issued a direction to the petitioner herein to issue a letter of appointment to the

respondent as TGT (Social Studies) as the last person selected in the SSSC Exam of 1998, ahead of those who have been recruited in the subsequent examinations. Further consequential direction has been issued to the effect that she would be entitled to get seniority from her retrospective date of appointment. The Tribunal by its latter order dismissed the Review Application filed by the petitioner by holding that the same was not maintainable, it being an attempt to re-argue the case on merits.

2. A selection process was held by the Delhi Subordinate Services Selection Board (DSSSB) to fill up vacancies of TGT/Language Teaches in the schools run by the petitioner nos. 1 & 2 which arose in 1998-99 or earlier. Amongst others, there were 57 vacancies in the category of TGT (Social Science) (Female), which were notified on 8.5.98, 11.1.99 and 27.9.99. The respondent was a general category candidate who participated in the selection process for a post of TGT (Social Science). The petitioner states that the break up of these vacancies was as follows:

25	General
5	SC
23	ST
4	OBC
57	

3. These vacancies included horizontal reservation for 1

blind and 3 ex-serviceman candidates. This meant that such vacancies were to be adjusted laterally in any of the categories in which such candidates were available. Consequently, a candidate who is physically handicapped/blind, and is selected against the physically handicapped quota has to be placed in the appropriate category, if he also belongs to SC category, he will be selected in that quota and will occupy a slot meant for the scheduled caste candidate in the roster. Similarly, if he belongs to the general category, he will occupy a slot meant for the general category in the Roster.

4. Consequent upon the conclusion of the selection process conducted by the DSSSB for the post of TGT (Social Science), in the merit list prepared by the petitioner for the general category, respondent's name appeared at serial no. 25. One Manisha, a visually handicapped candidate, respondent no. 4 herein, was placed at serial no. 38 in the general category merit list.

5. This dispute has arisen since respondent no. 4 has been appointed by the petitioner, with the result that the respondent no. 1 could not be accommodated, since, according to the petitioner, there were only 25 vacancies in the general category and there was horizontal reservation of one post for a

visually handicapped candidate which was alloted to respondent no. 4.

6. It appears that after the conclusion of the selection process wherein the respondent had participated, the petitioner initiated a fresh recruitment process by issuing an advertisement dated 12.12.2000 for which the petitioner called applications for filling up 24 posts of TGT (Social Science).

7. Thereupon respondent no. 1 filed OA No. 1947/01 to challenge her being denied appointment. Based on the fact that further vacancies of TGT (Social Science) had been notified in December, 2000, the contention of respondent no. 1 was that there were existing vacancies against which she ought to have been appointed. This petition was disposed of on 7.8.2001 directing the petitioner herein to consider her representation and pass an appropriate order.

8. The petitioner passed an order dated 21.9.2001 in compliance of the aforesaid order, the relevant portion whereof reads as follows:-

> "I have also carefully gone through the department's record on the subject. According to the facts in File No.DE.3(34)/E-III/99 of Establishment-III Branch, DSSSB had forwarded dossiers of 633 candidates who were declared successful in the exam conducted on 8.8.1999 against notified vacancies under different subjects. Smt. Sunita Mumgai was one of them for the post of TGT (Social Science) Female. The vacancies notified under Social Science female category were as under:-

Total vacancies notified TGT Social Science (Female)	Gen.	SC	ST	OBC	OPH Blind (For lateral adjustment only)
57	25	05	23	04	01

Against this notified vacancies, the DSSSB has forwarded 64 dossiers as under :-

General Category 26.[from S.No.1 to 25 & 38 (VH)]
Scheduled Caste Category 05.[S.No.26, 28, 29, 30 & 32]
OBC 04.[S.No.27, 31, 33 & 35]
Scheduled Tribe Category 29.[S.No. 34, 36, 37, 39 to 64]

Thus, it is seen that dossier of one candidate was forwarded in excess of notified vacancies under Social Science female general category and dossiers of 6 candidates in excess of notified vacancies under Social Science (female) Scheduled Tribe category were received. In other categories also, dossiers in excess of notified vacancies were received.

Receipt of excess dossiers and inclusion of excess candidates in the panel is a standard practice. Inclusion of the names in the panel does not automatically confer the right of appointment. The appointment is offered to the candidates subject to the availability of the vacancies and in order of merit.

In this case, though Mrs. Mumgaie's name figures in the panel, unfortunately she could not be offered appointment because before her turn could come, the vacancies had exhausted.

I understand her anxiety and dis-appointment but there appears no way by which she could be accommodated. All dossiers which could not be offered appointment up to December, 2000 were returned to the DSSSB for cancellation. The dossiers returned to the DSSSB included the dossier of Mrs. Mumgaie.

In view of the above facts, it is regretted that it is not possible to offer appointment to Mrs. Sunita Mumgaie." (emphasis supplied)

9. The respondent, it appears, continued to represent to the petitioner to seek appointment on the basis of her merit

position as aforesaid, on the ground that sufficient number of vacancies were still available for the post of TGT (Social Science). Respondent relied upon OM dated 8.2.1982 bearing no. 22011/2/79-Estt (D) and the decision of the Hon'ble Supreme Court in ***Prem Prakash vs. Union of India & Ors.*** AIR 1984 SC 1831, wherein the said OM had been dealt with.

10. At this stage, we may reproduce the relevant extract of the OM dated 8.2.1982 as also the relevant extract from the decision of the Hon'ble Supreme Court for a proper understanding of the respondents case.

> Extract of OM dated 8.2.1982.
>
> "4. Once a person is declared successful according to merit list of selected candidates, which is based on the declared number of vacancies, the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change, after his name has been included in the list of selected candidates. Thus, where selected candidates are awaiting appointment, recruitment should either be postponed till all the selected candidates are accommodated or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointments first, before starting appointments from a fresh list from a subsequent recruitment of examination."
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> Extract from the judgment of the Supreme Court in ***Prem Prakash*** (supra):

> “It is clear from this notification that if selected candidates are available from the previous list there should either be no further recruitment until those candidates are absorbed or in the alternative vacancies which are declared for the subsequent years should take into account the number of persons who are already in the list of selected candidates who are still awaiting appointment. The notification further shows that there should be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies. Once a person is declared successful according to the merit list of selected candidates the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change after his name is included in the list of selected candidates.”

11. These representations were also turned down by the petitioner in January, 2002. In May 2002, the petitioner issued another advertisement to fill up 26 vacancies in the post of TGT (Social Science). Thereupon, respondent no. 1 again approached the Tribunal by filing OA No. 1485/02. Apparently, the petitioner's order dated 21.9.2001 was not impugned by the respondent before the Tribunal in this O.A. The respondent relied upon OM dated 8.2.1982 before the Tribunal to contend that she could still be appointed against the existing vacancies. Once again, the said OA was disposed of by the Tribunal vide order dated 3.6.2002, thereby directing the petitioner to pass a reasoned and speaking order in the light of OM dated 8.2.1982.

12. The petitioner passed yet another order on 7.8.2002

stating that it was not possible to offer an appointment to respondent no. 1. Consequently, respondent no. 1 once again knocked the doors of the Tribunal complaining of the rejection of her representation and her being denied appointment to the post of TGT (Social Science). On this third occasion in OA No. 2568/02, respondent no. 1 came out victorious with the passing of the impugned order dated 9th April, 2003.

13. Learned counsel for the petitioner contends that the Tribunal gravely erred in misinterpreting the said OM dated 8.2.1982 and in failing to appreciate the ratio of the decision of the Hon'ble Supreme Court in ***Prem Prakash*** (supra). She further submits that the Tribunal had wrongly proceeded on the assumption that there were 58 vacancies of TGT (Social Science) (Female), when as a matter of fact, there were only 57 vacancies in that category and out of those only 25 vacancies were unreserved, subject to horizontal reservation, as aforesaid. She drew our attention to the reply filed by the petitioner to the OA, wherein it had been clearly stated that there were 57 vacancies of TGT (Social Science) (Female) which included 25 in the General category. She also submitted that the petitioner had, in fact, preferred a review petition bearing RA No. 153/2003, specifically pointing out this patent error in the judgment dated 9th April,

2003, but the Tribunal again failed to notice the error and rejected the Review application mechanically, holding the same as an attempt to re-argue the case by the petitioner.

14. Learned counsel for the respondent sought to justify the impugned order by placing reliance on ***Prem Prakash*** (supra) and the aforesaid OM. The respondent also contended that the petitioner ought to have maintained a separate reservation roster for each identified post filled through direct recruitment for the physically handicapped persons in Group 'A' and 'B' posts. It was contended that the validity of a panel of selected candidates is 1 year to 18 months. In the present case, further vacancies were advertised by the petitioner before the said period.

15. Having considered the matter, we are of the view that the judgment of the Tribunal passed in the aforesaid OA and RA are laconic and cannot be sustained. The categorical stand of the petitioner before the Tribunal was that there were a total of 57 vacancies notified for the post of TGT (Social Science) (Female), out of which 25 fell in the general category and one was reserved for blind candidate for lateral adjustment only. The relevant extract from the counter reply filed by the petitioner herein before the Tribunal through its Deputy Director, Administration (Director

of Education, Mr. M.R. Rao) is extracted here-in-below:-

> "That in the year 1999 DSSSB has forwarded dossiers of 633 candidates who were declared provisionally successful in the examination against notified vacancies under different subjects. Smt. Sunita Mumgai was one of them whose name appear at S.No. 25 of the merit list of 64 candidates for the post of TGT (Social Science) (Female). Merit list is placed at Annexure-1. She was recommended for appointment under General (UR) category. The vacancies notified under General (UR) category were as under :-
>
> | Total vacancies notified TGT Social Science (Female) | Gen. | SC | ST | OBC | OPH Blind (for lateral adjustment only) |
> |---|---|---|---|---|---|
> | 57 | 25 | 05 | 23 | 04 | 01 |
>
> Against this notified vacancies, the DSSSB has forwarded 64 dossiers as under :-
>
> | | |
> |---|---|
> | General Category | 26 [from S.N.1 to 25 & 38 (VH)] |
> | Scheduled Cast Category | 05 [S.No. 2628, 29, 30 & 32] |
> | OBC | 04 [S.No.27, 31, 33 & 35] |
> | Scheduled Tribe Category | 29 [S.No. 34, 36, 37, 39 to 64]" |

16. Pertinently this was the consistent stand of the petitioner as can be seen from its earlier communication/order dated 21.9.2001 which is also extracted here-in-above. Despite this being the position, the Tribunal accepted the oral submission of the respondent while passing the impugned order that there were 29+29 = 58 vacancies which had been declared in the advertisement whereas only 57 persons had been called and that the applicant/respondent had been placed at serial no. 25 in the

general list as the last person. This is so recorded in Para 5 of its order dated 9th April, 2003 by the Tribunal.

17. The Tribunal did not go into the aspect as to whether there were, in fact, 57 or 58 posts notified to be filled in the selection process in question, and the Tribunal did not expressly reject the stand of the petitioner that there were only 57 posts which had to be filled in the selection process in question. Even a perusal of the Original Application filed by the respondent shows that the respondent did not seek to set up a case that the stand of the petitioner in its order/communication dated 21.9.2001 that there were 57 vacancies to be filled was incorrect and the number of vacancies were, in fact, 58.

18. Considering the fact that the petitioner had taken a categorical stand through a responsible officer by filing their reply before the Tribunal that there were 57 vacancies, out of which 25 fall in the general category, which could possibly include one reserved post for a visually handicapped candidate, as also the fact that the respondent did not produce any material to dispute the said position, in our view, the Tribunal fell in error in proceeding on the assumption that there were 58 vacancies to be filled by the petitioner which included 26 general category posts. We are also of the view that the Tribunal ought to have made

amends on in its own when the said patent error in its impugned order dated 9th April, 2003 was brought to its notice by the petitioner by filing a Review Application being RA No. 153/2003. Instead, it appears the Tribunal mechanically rejected the Review Application by terming it as an attempt to re-argue the issue.

19. On the aforesaid premise, that there were 57 vacancies, out of which 25 fell in the general category and 1 vacancy was horizontally reserved for the visually handicapped candidate, we now proceed to consider whether the respondent was entitled to the relief claimed by her in terms of the aforesaid OM dated 8.2.1982 and the judgment of the Supreme Court in ***Prem Prakash*** (supra).

20. It is well settled that merely because a person has been selected and placed on the select panel, he does not acquire an indefeasible right of being appointed (***Shankaran Dash Vs. Union of India*** 1991 (3) SCC 470). As explained by the petitioner in its counter affidavit before the Tribunal, out of the 57 vacancies 25 were unreserved, that is, falling in the general category, 5 reserved for scheduled casts, 23 reserved for scheduled tribes and 4 reserved for other backward classes. One vacancy was laterally/horizontally reserved for a visually handicapped candidate. As against 57 notified vacancies, DSSSB forwarded 64

dossiers which, inter alia, included 26 in the general category i.e from serial no. 1 to 25 and 38 (visually handicapped), as against 23 posts reserved for scheduled tribes category, 29 dossiers were sent by the DSSSB. It appears that dossier of one candidate was forwarded in excess of the notified vacancies under the (TGT Social Science) (Female) general category, and similarly dossiers of 6 candidates in excess of notified vacancies under the scheduled tribe category were received by the petitioners. The petitioners further state that from time to time, the candidates whose dossiers were received in excess of the notified vacancies were adjusted against the vacancies left out due to cancellation of dossiers under the respective subject/gender/category. The dossiers which could not be adjusted upto December, 2000 were returned to DSSSB for cancellation vide letter dated 12.1.2001 which include the dossier of the respondent. The panel was operated taking into account the number of notified vacancies and not the number of recommended candidates.

This conduct of the petitioners is reasonable and there is no illegality in it. We also find force in the submission of the petitioner that the receipt of excess dossiers and inclusion of excess candidates in the panel, which is stated a standard practice, does not automatically confer the right of appointment

on such candidates.

The Supreme Court in ***Sanjoy Bhattacharjee vs. Union of India*** (1997) 4 SCC 283, held that when the panel was made in the excess of the notified vacancies, the waiting list candidates have no right to seek appointment and such waiting list in excess of the notified vacancies is unconstitutional. To the same effect is the Judgment of the Hon'ble Supreme Court in ***Ashok Kumar and Ors. vs Chairman, Banking Services Recruitment Board and Ors.*** JT 1995 (8) SC 276, wherein the Hon'ble Supreme Court held that recruitment of candidates in excess of the notified vacancies is denial and deprivation of the constitutional rights, under Articles 14 and 16(1) of the Constitution, of other deserving candidates. In ***Union of India v. Kali Das Batish*** (2006) 1 SCC 779 and ***State of U.P. & Ors v. Raj Kumar Sharma,*** (2006) 3 SCC 330, the Hon'ble Supreme Court held that mere inclusion in the select list does not confer any right to be selected even if some vacancies are not filled up.

21. Now coming to the OM dated 8.2.1982, we find that the said OM had no application in the facts of the present case. Perusal of the extracted portion of the aforesaid OM would show that the said OM would apply where:

> 1) A person is declared successful according to merit list of select candidates;

2) The merit list of select candidates is based on the declared number of vacancies; and

3) The declared number of vacancies undergoes a change after the person's name is included in the list of select candidates.

22. It is in the aforesaid circumstances that the said OM mandates that further recruitment should either be postponed till all the selected candidates are accommodated or, alternatively, intake for the next recruitment reduced by the number of candidates already awaiting appointment, and the candidates should be given appointment first, before starting appointments from a fresh list from a subsequent recruitment process.

23. In the present case there were only 25 notified vacancies in the general category with one vacancy laterally reserved for a blind candidate. Unfortunately for the respondent the most meritorious visually handicapped candidate also happened to be a general category candidate. Consequently, that handicapped candidate i.e. respondent no.4 had to be adjusted against the general category vacancy. It cannot, therefore, be said that the respondent was amongst the successful candidates in the merit list based on the declared number of vacancies, since she was at srl.no.25 in the general category but had to make way for respondent no.4 on account of the horizontal reservation, as aforesaid. Secondly, it is not even the respondent's case that the

number of vacancies has undergone a change. There were 57 vacancies alone that were notified, out of which 25 belonged to general category and as a matter of fact 25 general category candidates were selected and given appointment. Consequently, the panel of selected candidates, i.e., those falling at serial not. 1 to 24 and respondent no. 4 who was the visually handicapped candidate, and, consequently entitled to be adjusted laterally against the serial no. 25 in the merit list for the general category, stood exhausted and there was no question of keeping the said panel alive for any length of time. We are fortified in our view by a Full Bench decision of this court in ***Maninder Kaur v. Delhi High Court & Ors.,*** 57 (1995) DLT 288 (FB), wherein, while dealing with the aforesaid O.M. in similar facts, this court held:

> "(36) The office memorandum dated 8th February 1982 is Annexure P.4 to the writ petition of Malkhan Singh. The said memorandum has also been reproduced in the decision of the Supreme Court in Prem Parkash's case. A perusal of the said memorandum shows that it is applicable in a case where a person is declared successful according to merit list of selected candidates which is based on the declared number of vacancies. The responsibility vests on the appointing authority to appoint such a person even if number of vacancies undergo a change after his name has been included in the list of selected candidates. <u>It is thus evident that if a candidate has not been selected against the declared number of vacancies no right flows to him on the basis of the aforesaid Memorandum.</u> Mr. Malkhan Singh had applied against one post

reserved for scheduled caste. For that post Mr. Padam Singh was selected, recommended and ultimately appointed. Likewise, the declared number of vacancies when Mr. Sanjay Kaul applied were four which were reserved for scheduled castes and scheduled tribes It was notified in the advertisement that these vacancies shall be filled from general category candidates in the event of suitable candidates from reserved category were not available. Only one candidate Mr. L.D. Maul belonging to scheduled castes community was found suitable. No other candidate from reserve category was found suitable. The High Court, however, prepared a panel of six candidates of general category. The name of Respondent Nos. 9, 7 and 8 were at Serial No. 1,2 and 3 respectively in the panel prepared in 1988. Mr. Sanjay Kaul was at serial No. 6 on the panel. There were also other advaocates at Serial No.4 and 5 of that panel. Against the four declared number of vacancies, one from scheduled caste community and three from general category were selected. Mr. Kaul cannot claim right to the appointment against a future vacancy. In case the contention that the entire panel is to be exhausted irrespective of the numbner of vacancies which may have been notified for selection is accepted, it may lead to continuing the panel in perpetuity which would be arbitrary and would infringe Article 14 and 16 of the Constitution thereby depriving other eligible candidates for being considered for public employment. In this regard we may also notice a recent decision of the Supreme Court in the case of Gujarat State Deputy Executive Engineers' Association Vs. The State of Gujarat & Ors. JT 1994 (3) SC 559. The Apex Court has held that a candidate from the waiting list has no . right to claim appointment to any future vacancy which may arise unless the selection was held for it. The effect of making appointments of candidates from the waiting list on candidates who become eligible for competing for vacancies available in future, was expressed by Supreme Court in the

following words -

> "Awaiting list prepared .in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Govern- ment may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as arid when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open'or even from service."

(37) It is also well settled that empanelment gives no right of appointment. The Supreme Court in the case of State of Bihar & Ors Vs. The Secretariat Assistant Successful and Examinees Union 1986 & Ors. JT 1993 (6) SC 462 has held -

> "It is now well settled that a person who is selected does not, on account of being

> empanelled alone, acquire any indefeasable right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary (See : Shankarasan Dash V. Union of India – 1991 (3) SCC 47 and Sabita Prasad & Ors. Vs .State ofBihar & Ors - 1992 (3) Scale 361). We are, therefore, of the opinion that the directions given by the High- Court for appointment of the empanelled candidates according to their position in the merit list against the vacancies till 1991 was not proper and cannot be sustained. Since, no examination has been held since 1987, persons who became eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudically effect them for no fault of theirs....” (emphasis supplied)

24. Consequently, we are of the view that the aforesaid OM dated 8.2.1982 and the judgment of the Hon'ble Supreme Court in ***Prem Prakash*** (supra) have no application in the facts of the present case.

25. We may also note that after the petitioners passed a detailed order dated 21.9.2001 clearly stating their position, which was passed in pursuance of the order dated 7.8.2001 in OA No. 1947/01, the respondent did not seek to question or challenge the same. She again approached the Tribunal only when further vacancies were notified in May, 2002. The conduct of the

respondent also goes to show that she was not aggrieved by the stand taken by the petitioners in the order dated 21.9.2001 and she founded her case on the fact that there were more and more vacancies being notified from time to time against one of which, she sought appointment.

28. In view of the aforesaid, we are of the view that the judgment of the Tribunal in OA No. 2568/02 and RA No. 153/03 cannot be sustained and we accordingly set aside the same. The OA filed by the respondent before the Tribunal is accordingly dismissed.

29. Parties are left to bear their respective costs.

VIPIN SANGHI, J.

A.K.SIKRI, J.

September 24, 2007
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